In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1452

FIRST NATIONAL BANK IN DALLAS, EXECUTOR OF THE ESTATE OF GEORGE PATTULLO, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

LUCILE W. PATTULLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The findings of fact, conclusion of law and opinion of the Court of Claims (Pet. App. A1–A28) are officially reported at 420 F. 2d 725.

JURISDICTION

The judgment of the Court of Claims was entered on January 23, 1970 (Pet. App. A1–A28). The peti-

385-253—1452

tion for a writ of certiorari was filed on April 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the retroactive application of the interest equalization tax to transactions which occurred after the public proposal of the tax violates the due process clause of the Fifth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The pertinent provisions of the Constitution and of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

On July 18, 1963, President Kennedy proposed to Congress an "interest equalization tax" to be levied on purchases of foreign securities. The purpose of the tax was to restrict capital outflow and thus alleviate the balance of payments problem. The President asked that the legislation be effective from the date of his proposal. On the same date, the Treasury Department published two documents describing the tax. These documents were made available to the press and general public and sent to members of the New York Stock Exchange. Treasury also published in the Federal Register of August 16, 1963, a notice that the proposed effective date of the legislation was July 19,

1963. Extensive publicity was given by the press to the proposed legislation, and brokers advised Americans considering the purchase of foreign securities that the legislation, if enacted, might be retroactive. Substantially as originally proposed, the legislation was signed into law on September 2, 1964. (Pet. App. A2–A5.)

George and Lucile Pattullo had accounts with a stock brokerage firm having offices in New York City, Toronto and Montreal. George received advice from the firm, but made the final decisions as to what stocks should be bought and sold for his and his wife's accounts. During late 1963 and early 1964, George instructed his brokers to purchase certain Canadian securities, notwithstanding cautions from them about the proposed retroactive tax. The purchases were effected on the Toronto exchange between November 13, 1963, and February 13, 1964, and paid for out of Canadian dollar accounts maintained by the Pattullos in Toronto. During this period the Pattullos substantially replenished their Canadian dollar accounts with proceeds from the conversion of United States dollars. (Pet. App. A5–A7.)

The Pattullos filed interest equalization tax returns in December, 1964, reporting their Canadian stock purchases on and after November 13, 1963, and paying the amounts shown to be due on the returns. Their subsequently filed claims for refund were not allowed, and this litigation ensued. (Pet. App. A7–A8.)

ARGUMENT

The decision below is sound. There is no direct conflict or other warrant for further review.

1. Petitioners' principal argument (Pet. 6–9) is that Congress can never give retroactive application to an entirely new form of tax—regardless of advance notice to the public of the proposed retroactivity—without depriving taxpayers of property in violation of the due process clause of the Fifth Amendment. They argue that only a tax rate increase, or a tax which has been "traditionally retroactively" imposed, may be enacted with retroactive effect.[1] For these propositions petitioners rely upon early decisions of this Court in which retroactive impositions of estate and gift taxes were held unconstitutional. *Nichols* v. *Coolidge*, 274 U.S. 531; *Blodgett* v. *Holden*, 275 U.S. 142; *Untermyer* v. *Anderson*, 276 U.S. 440; and *Coolidge* v. *Long*, 282 U.S. 582. And they invoke *Welch* v. *Henry*, 305 U.S. 134, as a decision which (Pet. 6) "sets up guidelines consistent with" the earlier cases cited.

In *Welch* v. *Henry*, this Court stressed the limited scope of the earlier decisions cited by petitioners as cases which (p. 147) "rested on the ground that the nature or amount of the tax could not reasonably have

[1] Petitioners state (Pet. 7) that Congress may also tax an "involuntary act" retroactively; but by "involuntary act" petitioners mean (Pet. 8) the receipt of income, as to which Congress would either be increasing the rate or making traditionally retroactive changes.

been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event."[2] And the Court held broadly that (*ibid.*):

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

There is nothing in *Welch* v. *Henry* which gears reasonable anticipation solely to the past practices of Congress.

This question was laid to rest as long ago as *United States* v. *Hudson,* 299 U.S. 498. Here, there was abundant public notice, beginning with President Kennedy's announcement, that the tax would apply retroactively. This fact appeared in Treasury publications, was widely reported in the press and was general knowledge among brokers. Indeed, petitioners themselves were informed by their brokers about the proposed retroactive legislation before they made the foreign investments involved.

The purpose of the interest equalization tax was to alleviate the balance of payments problem by restricting long-term capital outflow from the United States

---

[2] Not only was there no showing in the early cases of prior notice that the tax would be retroactively applied, but there was serious disagreement among members of the Court as to whether the tax statutes were intended by Congress to apply retroactively.

(Pet. App. A2). In the judgment of the President and Congress, legislation imposing a tax upon investments in foreign securities was the most suitable remedy available. Such legislation was within the taxing authority of Congress, despite the fact that "its effect may be to accomplish another purpose as well as the raising of revenue." *United States* v. *Doremus,* 249 U.S. 86, 94. The legislation was also within the power and duty of Congress, under Article I, Section 8 of the Constitution, to protect the value of the currency. As this Court said in *Ling Su Fan* v. *United States,* 218 U.S. 302, 311, "there can be no serious doubt that the power to coin money includes the power to prevent its outflow from the country of its origin." And the "same reasoning is applicable to the imposition of restraints upon transactions in foreign exchange." *Perry* v. *United States,* 294 U.S. 330, 356.

In order to make the interest equalization tax effective both as a taxing measure and as a capital control measure, it was essential that it be retroactive in application. Otherwise, the public proposal of the legislation would have aggravated the balance of payments problem by precipitating a rush to make foreign investments before they were taxed. H. Rep. No. 1046, 88th Cong., 1st Sess., p. 8; S. Rep. No. 1267, 88th Cong., 2d Sess., p. 9.

In view of the "nature of the tax and the circumstances in which it [was] laid," we submit that petitioners were not denied due process by reason of the

retroactive application of the tax to their Canadian investments.

2. Petitioners contend secondarily (Pet. 6) that the advance publicity for the interest equalization tax was "inadequate" and "misleading" notice as to them, because the announced purpose of the legislation was to curb the outflow of American dollars into foreign investments, and their foreign investments were made, they assert (Pet. 12), with foreign funds located abroad.

This argument is untimely made. It was not advanced in petitioners' claims for refund or in their petitions in the Court of Claims. As that court noted (Pet. App. A15, n. 12), the argument was advanced for the first time in petitioners' reply brief below and was conceded by petitioners' counsel at oral argument to be untimely. Petitioners may not now raise the contention. Cf. *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269.

At all events, as the Court of Claims stated (Pet. App. A15, n. 12), "The free convertibility between United States and Canadian dollars, and the instances of actual conversion of funds, * * * strongly tend to refute even the factual basis of [petitioners'] position." During the period in which the Canadian securities involved were purchased, petitioners substantially replenished the Canadian funds used to make the purchases with United States dollars (Pet. App. A7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
GRANT W. WIPRUD,
DANIEL B. ROSENBAUM,
Attorneys.

MAY 1970.

BLEED THROUGH, POOR COPY

APPENDIX

Constitution of the United States:

ARTICLE. I.

* * * * *

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * *

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

* * * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * *

FIFTH AMENDMENT

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 4911 [as added by Sec. 2(a), Interest Equalization Tax Act, P.L. 88-563, 78 Stat. 809]. Imposition of Tax.

(a) *In General.*—There is hereby imposed, on each acquisition by a United States person (as defined in section 4920(a)(4)) of stock of a foreign issuer, or of a debt obligation of a foreign obligor (if such obligation has a period remaining to maturity of 3 years or more), a tax determined under subsection (b).

(b) *Amount of Tax.*—

(1) *Stock.*—The tax imposed by subsection (a) on the acquisition of stock shall be equal to 15 percent of the actual value of the stock.

* * * * *

Sec. 4918 [as added by Sec. 2(a), Interest Equalization Tax Act, P.L. 88-563, 78 Stat. 809, 831]. Exemption for Prior American Ownership.

(a) *General Rule.*—The tax imposed by section 4911 shall not apply to an acquisition of stock or a debt obligation of a foreign issuer or obligor if it is established in the manner provided in this section that the person from whom such stock or debt obligation was acquired was a United States person throughout the period of his ownership or continuously since July 18, 1963, and was a United States person eligible

BLEED THROUGH, POOR COPY

to execute a certificate of American ownership with respect to such acquisition.

* * * * *

Interest Equalization Tax Act, P.L. 88-563, 78 Stat. 809, 841:

Sec. 2. Interest Equalization Tax.

* * * * *

(c) *Effective Date.*—

(1) *General rule.*—* * * the amendments made by this section shall apply with respect to acquisitions of stock and debt obligations made after July 18, 1963.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1970